Cert. 2

NO. 80-6368

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

HOWARD JONES,

Petitioner,

v.

WALTER D. ZANT,
WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's rights, under either the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of Article IV, Section II, of the United States Constitution, have been violated by the state habeas corpus court's ruling that it considered itself bound by the decision of the Georgia Supreme Court which held Petitioner had not been deprived of effective assistance of counsel?

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PART ONE

STATEMENT OF THE CASE

The Petitioner was indicted by the January Term, 1978, DeKalb County, Georgia Grand Jury for the offenses of malice murder and armed robbery. His co-indictees were his brother, Gilbert Jones, and James Ameen.

Following a jury trial, Petitioner was tried separately and convicted on August 15, 1978, on both of the aforesaid counts. The jury found two aggravating circumstances which supported their recommendation for the death penalty under the murder count. The jury found that the murder of victim Frank G. Shelnutt had occurred while the Petitioner had been engaged in the commission of another capital felony: to wit, armed robbery. Ga. Code Ann. § 27-2534.1(b)(2). The second aggravating circumstance found by the jury was that the Petitioner, by his act of murder, armed robbery or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. Ga. Code Ann. § 27-2534.1(b)(3). Petitioner was thus sentenced to the death penalty for the murder, and received a consecutive life sentence for the armed robbery.

Following the denial of Petitioner's motion for a new trial, he appealed to the Georgia Supreme Court. His convictions were affirmed, and thereafter this Court denied his petitions for a writ of certiorari and for rehearing. Jones v. State, 243 Ga. 820 (1979), cert. den., Jones v. Georgia, 444 U.S. 957 (1979), rehng. den., 444 U.S. 1027 (1980).

Petitioner next filed an application for state habeas corpus relief in the Superior Court of Butts County, Georgia. Following an evidentiary hearing which was held on March 25 and 26, 1980, the Superior Court of Butts County, in an order dated August 4, 1980, denied Petitioner's state petition. Petitioner's application for a certificate of probable cause to appeal to the Georgia Supreme Court was denied on October 8, 1980.

Thereafter, Petitioner filed this second petition for a writ of certiorari, this time challenging the ruling by the Butts County habeas corpus court denying Petitioner's state habeas corpus petition.

Petitioner's assertions in the instant petition pertain to the state habeas court's ruling that Petitioner was not deprived of effective assistance of counsel during his state trial in DeKalb County. Petitioner originally had retained Attorney Ben Adkins as defense attorney for the trial. Petitioner represented that he could not afford to retain an attorney for appeal, and thereafter, on October 31, 1978, Attorney William E. Zachary was appointed by the DeKalb Superior Court to represent the Petitioner. Attorney Zachary filed an extensive motion for new trial, and as a part thereof, alleged that Petitioner's prior attorney, Ben Adkins had been ineffective. A special hearing was held on December 8, 1979, whereat the trial court took evidence pertaining to the alleged ineffective assistance claims against Mr. Adkins. Following the hearing the trial court denied the motion for a new trial.

Thereafter, Petitioner retained another attorney, Brooks Franklin to represent him on appeal to the Georgia Supreme Court. In its opinion on this case, the Georgia Supreme Court notes that Petitioner enumerated some twenty acts or omissions which he had contended illustrated ineffective assistance of counsel. After reviewing the entire record, the Georgia Supreme Court found that Petitioner was not deprived of his right to effective assistance of counsel.

In the habeas corpus action which was filed in the Superior Court of Butts County, Petitioner was represented pro bono, by yet another attorney, Mr. Henry C. Johnson, Jr., who continues to represent Petitioner in this action. Additionally, Attorney Johnson was aided in the state habeas hearing by Attorney Scott McClarity and another attorney, Mr. Harold Miller, who had assisted Attorney Brooks Franklin on Petitioner's

direct appeal to the Georgia Supreme Court.

Relating to Petitioner's state habeas contention that he received ineffective assistance of counsel, the state habeas judge held that, "once this issue has been raised and decided by our Georgia Supreme Court, this Court is bound by the ruling in the decision there made." (See, Appendix A to the Petition). Additionally, the habeas judge noted that Petitioner attempted to enlarge upon his original contentions of ineffective assistance of counsel; however, the new contentions and evidence thereon were insufficient to justify the granting of relief. (Id.).

As noted previously, the Georgia Supreme Court refused to grant Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas relief.

PART TWO

REASON FOR NOT GRANTING THE WRIT

SINCE PETITIONER'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE WERE THOROUGHLY REVIEWED BY THE GEORGIA SUPREME COURT ON DIRECT APPEAL, AND SINCE THE PETITIONER HAS SHOWN NO CHANGE IN THE LAW OR FACTS WHICH JUSTIFY A RELITIGATION OF THAT ISSUE, THE STATE HABEAS CORPUS COURT PROPERLY FOLLOWED ESTABLISHED GEORGIA LAW, AND HELD THAT RELIEF UNDER THIS ALLEGATION WAS NOT WARRANTED.

It has long and consistently been held in Georgia that a state habeas corpus court need not adjudicate an issue which has already been decided by an appellate court on direct appeal, unless there has been a change in either the facts or the law. Zant v. Campbell, 245 Ga. 368, 369, 265 S.E.2d 22 (1980), cert. den., ___U.S.___, 101 S.Ct. 252 (1980); Gibson v. Ricketts, 244 Ga. 482, 483, 260 S.E.2d 877 (1979), cert. den., 445 U.S. 920 (1980); Brown v. Ricketts, 233 Ga. 809, 811, 213 S.E.2d 672 (1975); Andrews v. Alderhold, 201 Ga. 132, 135, 39 S.E.2d 61 (1946), cert. den., 329 U.S. 755 (1946) [cases cited]. The Georgia Supreme Court has recognized that while the doctrine of res judicata has been held inapplicable per se in the federal courts, Brown v. Ricketts, supra, Andrews v. Alderhold, supra, citing Salinger v. Loisel, 265 U.S. 224 (1924), nevertheless, it has also been recognized that notwithstanding the refusal to apply res judicata in federal habeas corpus, successive petitions raising grounds which were or could have been raised earlier need not always be entertained. Id. "[E]ach application is

to be disposed of in the exercise of sound judicial discretion guided and controlled by consideration of whatever has a rational bearing on the propriety of the discharge sought." Salinger v. Loisel, 265 at p. 231. Also see, 28 U.S.C. § 2244. Thus, in cases such as Wong Doo v. United States, 265 U.S. 239 (1924), it has been held that a successive petition need not be entertained where the Petitioner had a full opportunity to offer proof on an issue, but failed to do so even though evidence was accessible to him at the time of the initial hearing. See also, McDonald v. Estelle, 590 F.2d 153, 155 (5th Cir. 1979).

As noted previously, in the instant case, the Petitioner originally retained counsel for his trial. Shortly after his conviction, the state trial court appointed an attorney, who in his motion for a new trial, challenged the effectiveness of the first counsel. Following a hearing on the motion for new trial and denial of same, Petitioner retained another attorney who raised approximately twenty enumerations of error alleging ineffective assistance through acts or omissions of Petitioner's first attorney. Following a thorough review of the entire record, the Georgia Supreme Court found the allegations were without merit. Jones v. State, 243 Ga. at p. 830-831.

In his state habeas action, the Petitioner was represented by yet another attorney, who raised several new allegations of ineffective assistance, in addition to raising many of the same assertions as were raised on direct appeal. At the state hearing, Petitioner made no showing that the new allegations could not have been raised or enumerated in the motion for new trial or on direct appeal, nor did he present any evidence showing a change in the law or facts which would authorize the habeas court's circumventing the decision of the Georgia Supreme Court. Thus, the state habeas judge was justified in applying the established Georgia law, considering himself bound by the decision of the Georgia

Supreme Court. The habeas court also held that the new allegations, upon which Petitioner had presented proof, still did not authorize the granting of relief. See, Appendix A to the petition.

The issues that Petitioner raises in the instant petition pertain, in actuality, to a question of state law relating to the application of Ga. Code Ann. § 50-127, the exclusive state procedure for pursuing a writ of habeas corpus by a person whose liberty is being restrained by virtue of a sentence imposed against him by a state court of record.

If the Petitioner asserts that the rulings of the state courts below have denied him a full and fair hearing on the issue of ineffective assistance, he may assert this claim while filing an application for federal habeas corpus relief, and his argument, of course, will be considered by the district court as required under 28 U.S.C. § 2254(d). However, the application of the state procedural rule does not require plenary review in this forum at this time.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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